Supreme Court, U.S.
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No. 04-31

IN THE

Supreme Court of the United States

HOMAN MCFARLING,

Petitioner,

v.

MONSANTO COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of patent misuse prohibits the owner of patents covering biotechnology that genetically modifies plants to resist certain herbicides from licensing farmers to use seed containing that patented technology only to grow a single commercial crop to be sold as a commodity but not to use the genetically-identical progeny of the initial planting for replanting or sale to others as seed.

2. If the above is not patent misuse, then whether such a licensing program could nevertheless violate section 2 of the Sherman Act as a "tying" arrangement, even though the patent owner does not require the farmer-licensee to purchase any additional seed in future years or any other product as a condition of purchasing the genetically modified seed containing the patented technology.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those identified in the caption.

RULE 29.6 STATEMENT

Monsanto has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-31) is reported at 363 F.3d 1336. The decision of the district court (Pet. App. 35-49) is unreported. A prior decision of the court of appeals is reported at 302 F.3d 1291.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2004. Pet. App. 1. The petition for a writ of certiorari was filed on July 6, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. This is a patent-infringement and contract dispute arising out of respondent Monsanto's efforts to protect its

patented biotechnology in soybean plants and plant seeds that have been genetically modified to be resistant to certain herbicides. The active ingredient contained in Monsanto's Roundup® herbicide, glyphosate, is highly effective at destroying most forms of noxious weeds, but it can also cause severe damage to crop plants. After a considerable investment of resources, Monsanto developed recombinant DNA technology that, when inserted into certain crop seed (including soybeans), protects the resulting genetically modified crop plants from being harmed by applications of glyphosate. This biotechnology permits farmers to spray Roundup® or other glyphosate-based herbicide over an entire field to control weeds without fear of harm to their crops. *See* Pet. App. 2-3.

Monsanto brands and licenses its patented biotechnology as Roundup Ready® seed. To market this patented biotechnology, Monsanto licenses seed companies to manufacture the herbicide-resistant seeds by inserting the modified gene into soybean germplasm and then to sell the seeds to farmers subject to certain license restrictions. Monsanto requires farmers who purchase seeds containing the patented technology to obtain a license, typically by signing a Technology Agreement with Monsanto. This Technology Agreement provides that the seeds containing Monsanto's patented technology are to be used "for planting a commercial crop only in a single season" and expressly states that the farmer-licensee may not "save any crop produced from this seed for replanting, or supply saved seed to anyone for replanting." Pet. App. 4.[1]

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[1] Soybean seeds self-replicate at an exponential rate, leaving farmers at the end of the growing season with an abundance of seed that could be sold as a commodity, saved for replanting in the following year, or sold to someone else for use as seed. A single Roundup Ready® soybean seed produces a plant that yields 25 to 50 genetically-identical seeds. Thus, allowing soybeans containing the patented technology to be saved for replanting or sale as seed would mean that the patent owner's ability to protect or exploit that technology would effectively be lost as soon as the first

2. In conjunction with purchasing Roundup Ready® soybean seed, petitioner obtained a license in 1998 to plant that seed as a commercial crop in one growing season. Petitioner signed the 1998 Technology Agreement when he purchased the seed, thereby agreeing not to replant or transfer the genetically-identical progeny of that seed. Petitioner has conceded, however, that, contrary to the express terms of the Agreement, he saved 1,500 bushels of Roundup Ready® soybeans from his 1998 harvest and replanted them the following season. Pet. App. 5. He then repeated that unauthorized activity by saving and replanting soybeans containing Monsanto's patented technology again in the following growing season. *Id.*

3. Monsanto filed suit against petitioner in the United States District Court for the Eastern District of Missouri, as provided for in a forum-selection clause of the Technology Agreement. Monsanto alleged that petitioner had infringed its patents covering the technology contained in the Roundup Ready® seed and breached the terms of the Technology Agreement, and sought a preliminary injunction against further infringement. Petitioner moved to dismiss for lack of personal jurisdiction and raised various counterclaims and defenses, charging Monsanto with patent misuse and violation of the antitrust laws and the Plant Variety Protection Act (PVPA), 7 U.S.C. §§ 2321 *et seq.* Petitioner did not challenge the validity of Monsanto's patents. *See* Pet. App. 5-6.

After an evidentiary hearing, the district court ruled that the forum-selection clause is valid and that Monsanto had shown a likelihood of success on the merits of its patent-infringement and contract claims. The district court therefore entered a preliminary injunction. On appeal from that injunction, petitioner challenged both decisions before the court of appeals, which affirmed, 302 F.3d 1291 (Fed. Cir.

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generation of the product was introduced into the market without reasonable license restrictions.

2002) ("*McFarling I*"). On the merits of the preliminary injunction, the court of appeals held that petitioner had failed to establish a likelihood of success on his counterclaims and defenses that Monsanto's license restrictions violated the antitrust laws, the "first sale" doctrine of exhaustion, or the PVPA, or otherwise constituted patent misuse. *Id.* at 1297-99. This Court denied certiorari, 537 U.S. 1232 (2003).

4. The district court then addressed the merits of Monsanto's claims and petitioner's counterclaims and defenses. The court ruled that petitioner had breached the Technology Agreement by replanting soybean seeds containing Monsanto's patented technology that he had saved from his previous year's crop. After calculating damages on the breach of contract claim, the court granted summary judgment for Monsanto on that claim and against petitioner on his patent-misuse defense and antitrust counterclaims. The court accordingly found it unnecessary to resolve Monsanto's patent-infringement claims. The court entered final judgment for Monsanto pursuant to Fed. R. Civ. P. 54(b). Pet. App. 7; 32-33.

The court of appeals affirmed, rejecting in particular petitioner's contentions that the license restrictions in the Technology Agreement were invalid under either the patent-misuse doctrine or the Sherman Act. In his patent-misuse defense, petitioner argued that Monsanto had "impermissibly tied an unpatented product to a patented product." Pet. App. 8. Although the court of appeals recognized that tying can constitute patent misuse, *id.* at 9 (citing *Carbice Corp. of Am.* v. *American Patents Dev. Corp.*, 283 U.S. 27, 30-31 (1931) and *Senza-Gel Corp.* v. *Seiffhart*, 803 F.2d 661, 665 (Fed. Cir. 1986)), it also noted that petitioner was "not rais[ing] a typical tying allegation, and the mere recitation of the word 'tying' is not sufficient to state a patent misuse defense," *id.* at 9-10. Petitioner did not argue, for example, that Monsanto prevented him from purchasing soybean germplasm without Monsanto's patented Roundup Ready® technology, and the court noted that it had already found that a market for such unmodified soybean seed ex-

ists. *Id.* at 10 (citing *McFarling I*, 302 F.3d at 1298). Moreover, petitioner did not contend that he desired, or could make use of, a license for Monsanto's patented technology apart from or prior to its insertion into conventional germplasm. *Id.*

Rather, petitioner's patent-misuse argument was based on Monsanto's refusal to grant permission to replant the genetically identical progeny of the seeds containing Monsanto's technology that he had purchased pursuant to the Technology Agreement—in other words, Monsanto's decision not to license petitioner to use or sell a second generation of soybeans containing Monsanto's technology as seed. The court of appeals rejected this argument, refusing to hold that the "exercise of [Monsanto's] right to exclude from the patented invention by itself is a 'tying' arrangement that exceeds the scope of the patent grant." *Id.* Recognizing that this case presents "a unique set of facts" where the goods containing the patented technology are used to produce "nearly identical" copies that contain that same patented technology, the court of appeals held that the "licensing restrictions on the use of goods produced by the licensed product are not beyond the scope of the patent grant at issue." Pet. App. 11-12. Because Monsanto's patented technology is reproduced and thus contained in subsequent generations of Roundup Ready® soybean seed, the court concluded that "the restrictions in the Technology Agreement prohibiting the replanting of the second generation of ROUNDUP READY® soybeans do not extend Monsanto's rights under the patent statute." *Id.* at 12.

The court of appeals then turned to petitioner's tying antitrust counterclaim—which it described as a "repackage[d]" version of his tying patent-misuse defense. Pet. App. 12. Because the court had found petitioner's "allegations insufficient to present a genuine issue of material fact concerning whether Monsanto's licensing restrictions went beyond the boundaries of its patent grant," the court concluded that petitioner's "antitrust counterclaim also fails." *Id.* at 12-13.

Finally, with regard to petitioner's argument that " 'the district court improperly . . . decided that the patented technology (the patented "trait") and the seed are not two separate markets' without examining consumer demand for either," the court agreed that the question whether there are two distinct products for tying purposes requires examining consumer demand. Pet. App. 13. Nevertheless, because petitioner did not claim that he was unable to purchase natural soybean seed and the modified gene as separate products, but rather that he should be able to purchase a license that authorized him to use subsequent generations of the seed containing Monsanto's patented traits as he wished, the court of appeals held that the district court's conclusion about the nature of the market was irrelevant to its holding and declined to review it.

ARGUMENT

The court of appeals correctly held in this case that (a) a patent holder does not exceed the scope of the patent grant and engage in a tying arrangement simply by virtue of exercising its right to exclude from certain uses of the patented invention, and (b) petitioner's antitrust tying claim based on the same theory as his patent misuse claim fails for the same reasons. Neither aspect of the court of appeals' ruling conflicts with this Court's decisions on patent misuse and tying or the decision of any other court of appeals. Moreover, both rulings are manifestly correct. The premise of petitioner's tying argument—that Monsanto has tied the purchase of its patented technology to the requirement that new Roundup Ready® seed be purchased in the future—is simply wrong. Licensees are free to decide not to purchase Roundup Ready® seed in the future and to purchase competitors' seed; they are merely prevented from saving the crops containing Monsanto's patented technology for replanting or sale to others as seed. Accordingly, the issues raised by petitioner do not warrant this Court's review, and certiorari should therefore be denied.

1. Petitioner first incorrectly contends (Pet. 9-10) that Monsanto has engaged in an unreasonable restraint of trade

by prohibiting customers from replanting or selling any seed produced containing Monsanto's patented technology. In support of this argument, petitioner repeatedly mischaracterizes the scope of the license conveyed in the Technology Agreement as "not allow[ing] [farmers] to purchase the Monsanto technology without also agreeing to buy overpriced new seed"; mandating that "[a] farmer cannot purchase the technology unless he agrees to purchase new seed each year"; and "[r]equiring farmers to purchase a tied product (new soybeans) as a condition to purchasing a desired product (the patented technology)." *Id.* Not one of these descriptions of Monsanto's licensing practice is accurate.

Monsanto does not require farmers to purchase its Roundup Ready® seed in future growing seasons as a condition of purchasing it now. Instead, Monsanto merely requires each farmer-licensee to sell the resulting crop of soybeans produced from the purchased Roundup Ready® seed as a commodity rather than saving it to be replanted or sold to others as seed. As the court of appeals recognized, farmers are free at all times to purchase competitors' seed—including conventional seed—or to elect not to purchase any additional Roundup Ready® seed containing Monsanto's technology. Pet. App. 10 ("McFarling does not argue that he cannot purchase soybean germplasm without the genetic trait that brings the soybean within the ambit of Monsanto's patent. In fact, a market for such unmodified soybeans exists.").

Nor is there any evidence that Monsanto refuses to license the modified gene separately for insertion into a soybean germplasm as it does regularly with seed companies. Pet. App. 10. What Monsanto does require is that licensees use the seed containing the patented technology to grow a single commercial crop in a single season and not save any soybeans produced for use as seed for replanting or transfer to a third party. *Id.* at 4. This license restriction is well within the scope of Monsanto's patent right and constitutes a straightforward exercise of the right to exclude that is in-

herent in patent ownership. *See Dawson Chem. Co.* v. *Rohm & Hass Co.*, 448 U.S. 176, 215 (1980) (describing "long-settled view that the essence of a patent grant is the right to exclude others from profiting by the patented invention"); *see also* 35 U.S.C. § 271(d) (1999) ("No patent owner otherwise entitled to relief ... shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having ... (4) refused to license or use any rights to the patent.").

Petitioner maintains that Monsanto may not prohibit him from using the genetically identical progeny of the seed that he purchased, which contains Monsanto's patented biotechnology, provided that he pays Monsanto a license fee for a second use of that biotechnology. As the court of appeals recognized (Pet. App. 10), petitioner essentially is arguing that Monsanto must grant him a compulsory perpetual license for unlimited use of its patented technology for all future crops grown in subsequent seasons. Patent law, however, does not require Monsanto to license multiple, subsequent uses of its technology. To the contrary, patent law strongly disfavors compulsory licenses as fundamentally incompatible with the right to exclude that lies at the heart of the patent right. *See Dawson*, 448 U.S. at 215 (noting that "[c]ompulsory licensing is a rarity in our patent system"). Indeed, basic principles of patent law establish that a patent holder may license its patented technology as broadly or as narrowly as it wishes without misusing its patent. *See E. Bement & Sons* v. *National Harrow Co.*, 186 U.S. 70, 91 (1902) ("[T]he rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts.").

Petitioner's remaining arguments in support of a restraint of trade theory are equally unavailing and, in any event, provide no basis for this Court's review. The fact that seed-company licensees that insert Monsanto's patented biotechnology into their germplasm and sell it as Roundup

Ready® seed also receive a benefit from the sale (Pet. 9), without more, is insufficient to establish an unreasonable restraint of trade. *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 25 (1984) ("[T]here is nothing inherently anticompetitive about packaged sales."). The theoretical availability of what petitioner postulates as a "less restrictive alternative," in which Monsanto would allow farmers to save and replant the patented seed, and then seek to collect the Technology Fee in subsequent seasons (Pet. 10), does not demonstrate that Monsanto's refusal to do so is an unreasonable restraint of trade. Indeed, absent such a license restriction, it is difficult to believe that any seed company would agree to incorporate Monsanto's technology into their germplasm, given that the market for the transformed germplasm would last for only one year.

In addition, as the court of appeals recognized, this case "presents a unique set of facts in which licensing restrictions on the use of goods produced by the licensed product are not beyond the scope of the patent grant at issue." Pet. App. 11-12. The court determined that the goods produced by the licensed product were not beyond the scope of the patent grant in large part because, in the context of this appeal, it had to presume that Monsanto's patented technology in the "first generation" seeds would be reproduced and thus be present in the "second generation" seed as well. *Id.* at 12. Under these circumstances, any review of the issue by this Court would be limited to the unique facts and procedural posture of this case and could reach no other conclusion.

2. Although petitioner maintains that the court of appeal's decision conflicts with the decisions of other circuits (Pet. 12-13), the alleged conflict is wholly illusory. Petitioner cites *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), for the proposition that "owning patents on all products covered by a licensing agreement does not immunize the agreements from antitrust scrutiny" (Pet. 12), but the court of appeals in this case did not suggest that patent ownership provides immunity from the antitrust laws. Indeed, the Federal Circuit has repeatedly recognized that

"[i]ntellectual property rights do not confer a privilege to violate the antitrust laws." *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000); *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999). In *Microsoft*, the D.C. Circuit simply rejected the extreme position that a copyright owner has "an absolute and unfettered right to use its intellectual property as it wishes." 253 F.3d at 63. The court held that this argument "borders upon the frivolous" and quoted the Federal Circuit in *Independent Service Organizations* for the absence of such a privilege. *Id.*[2]

Nothing in the court of appeals decision in this case is inconsistent with the D.C. Circuit's ruling or Federal Circuit precedent that intellectual property rights—whether in copyright or patent—do not provide immunity from the antitrust laws. Instead, the court below held that petitioner's antitrust counterclaim failed for the same reason that his patent-misuse defense failed—namely, that petitioner was not actually complaining about an inability to purchase either product separately, but rather about the license restriction against planting or selling second-generation seeds containing biotechnology that has been discovered, developed, and patented by Monsanto. The court recognized that "[t]ying can constitute patent misuse," for example, when "[a] patent licensor who conditions the license on a patent licensee's purchase of an unpatented material" thereby "impermissibly extending the scope of the subject matter encompassed by the patent grant." Pet. App. 9.

Although petitioner attempts to conjure a split among the circuits by describing the court of appeals' opinion as holding that, because "Monsanto has a patent both on the patented technology and on the seed, Monsanto's prohibiting seed-saving cannot constitute either patent abuse or an

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[2] The court of appeals in this case quoted *Independent Service Organizations* for the proposition that an antitrust claim "does nothing to limit the right of the patentee to refuse to sell or license in markets within the scope of the statutory patent grant." Pet. App. 13.

antitrust violation" (Pet. 8), the court of appeals held no such thing. Rather, the court held only that, under the circumstances of this case, petitioner's antitrust claim was simply a repackaged version of his misuse defense and rejected it for the same reason—namely, that Monsanto is not impermissibly extending its patent monopoly over an unpatented product through a tying arrangement because Monsanto's patented technology is found in the second generation seeds as well.

Petitioner also vainly attempts to manufacture a conflict with the Third Circuit's decision in *Mannington Mills, Inc.* v. *Congoleum Industries, Inc.*, 610 F.2d 1059 (3d Cir. 1979). In *Mannington Mills*, the district court had held that the plaintiff could not state a valid antitrust claim "based exclusively upon [the defendant's] status as a patentee." *Id.* at 1069. The Third Circuit "recognize[d] that promotion of the policies that underlie the federal patent laws may on occasion require that the application of normal antitrust principles to patent license restrictions be moderated or withheld entirely," but concluded, "[o]n the facts alleged[,] . . . that the antitrust exemption created by the district court extends more broadly than is necessary to that end." *Id.* at 1069-1070. Moreover, the court distinguished a horizontal agreement among licensees designed to reduce competition from the scenario "[w]here a patentee's license restrictions are imposed vertically upon the licensee, in pursuit of the patentee's own marketing strategy." *Id.* at 1073. Those circumstances, the Third Circuit found, indicate "the legitimate exploitation of the patent monopoly" and suggest that the restrictions imposed on the license "are among those significant to the patentee's initial decision whether to license the manufacture or sale of the patented invention." *Id.*

Monsanto's license restrictions clearly fall in this latter category. They are "imposed vertically" on farmers as part of Monsanto's marketing strategy that allows its valuable technology to be incorporated into a large variety of different germplasm for the benefit of farmers and the public. The license restricting a farmer's use of Monsanto's

Roundup Ready® seed for only one season to produce a single commercial crop is not part of a scheme to reduce competition, but rather represents the legitimate exploitation of Monsanto's patent rights on the biotechnology present in the second-generation seeds and the exercise of its right to exclude unauthorized use or sale of such technology.[3]

3. Petitioner is also far afield in contending that the court of appeals "radically extended the previous reach of the patent laws as this Court has defined them." Pet. 13. Petitioner observes that Roundup Ready® seed contains not only the genetically altered components protected by Monsanto's patented technology, but many other genes that were not modified by Monsanto and hence are "products of nature." *Id.* at 13-14 ("The seed contains not only a genetically-altered gene, but also contains thousands of other genes which are not made by Monsanto but by God"). But the court of appeals did not deviate from the principle that "the patent laws cannot be extended to include products of nature." *Id.* at 14 (citing *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (1996)).

Rather, the court of appeals correctly gave effect to the principle that, as long as the modified seed at issue contains the genetic technology patented by Monsanto, then it is properly subject to the patent laws, regardless of the source or origin of the other, unpatented components. The mere fact that the genetic material in the soybean seed, including the patented components, was identically reproduced did not

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[3] Petitioner's reliance on *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), is equally misplaced. Pet. 13. *Yarn Processing* involved a horizontal agreement between the patentee and its licensee machine manufacturers under which the manufacturers received a certain portion of the royalty payments received by the patentee from use of the machines by the end user. The Fifth Circuit found that these agreements resulted in an identical, guaranteed rate of compensation to each manufacturer and held that this amounted to price fixing and patent abuse. Here, however, there was no evidence of such a horizontal agreement and in fact there is substantial price competition among seed companies licensed to use Monsanto's technology.

convert everything in that genetic material into a product of nature, such that there are no man-made components covered by a patent in it. To the contrary, this Court has held that reproducible man-made inventions included within living organisms, including genetically modified seed, are patentable. *See Diamond* v. *Chakrabarty*, 447 U.S. 303, 309 (1980) (holding that a live, human-made microorganism that is "a nonnaturally occurring manufacture or composition of matter" is patentable). The genetic technology patented by Monsanto is present in the Roundup Ready® seed at issue and is reproduced in future generations of the seed. That is all that is required for infringement when a licensee appropriates the technology present in the second generation of the plant to a use not authorized by the license, regardless of what other "natural" genes or components may be present in such seed.[4]

[4] In any event, because this case was decided by the court of appeals on appeal from a Rule 54(b) judgment entered solely with respect to the non-patent claims, any dispute regarding the scope of Monsanto's patent claims or the merits of Monsanto's infringement claim is not properly before this Court.

CONCLUSION

For the reasons discussed above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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